

Nos. 15983-15984 ✓

United States
Court of Appeals
for the Ninth Circuit

THOMAS M. ROBINSON, Appellant,

vs.

WILLIAM G. ELLIOT, Appellee.

THOMAS M. ROBINSON, Appellant,

vs.

THOMAS W. ELLIOT, and EVELYN W. ELLIOT, Appellees.

Transcript of Record

(In Two Volumes)

VOLUME II.

(Pages 105 to 152, inclusive)

Appeals from the United States District Court
for the District of Montana

FILED

JUN 12 1958

PAUL P. O'BRIEN, CLERK

Nos. 15983-15984

United States
Court of Appeals
for the Ninth Circuit

THOMAS M. ROBINSON, Appellant,
vs.

WILLIAM G. ELLIOT, Appellee.

THOMAS M. ROBINSON, Appellant,
vs.

THOMAS W. ELLIOT, and EVELYN W. ELLIOT,
Appellees.

Transcript of Record

(In Two Volumes)

VOLUME II.

(Pages 105 to 152, inclusive)

Appeal from the United States District Court
for the District of Montana

In the District Court of the United States, District
of Montana, Billings Division

No. 1727

WILLIAM G. ELLIOT, Plaintiff,

vs.

THOMAS M. ROBINSON, Director of Internal
Revenue, Defendant.

No. 1728

THOMAS W. ELLIOT, Plaintiff,

vs.

THOMAS M. ROBINSON, Director of Internal
Revenue, Defendant.

TRANSCRIPT OF PROCEEDINGS

Billings, Montana,

June 15, 1956

Before: Honorable Charles N. Pray.

Appearances: Messrs. Felt and Burnett, Attorneys at Law, Billings, Montana, and Mr. Jerome Anderson, Attorney at Law, Billings, Montana, for Plaintiffs. Mr. Dale Galles, Assistant U. S. Attorney, Billings, Montana, Mr. John A. Rees, Assistant Attorney General, Washington, D. C., for Defendant. [1]*

The above-entitled causes came on regularly for

* Page numbers appearing at bottom of page of Reporter's Transcript of Record.

trial at Billings, Montana, on June 15, 1956, before the Honorable Charles N. Pray, United States District Judge.

Whereupon the following proceedings were had and done, to wit:

The Court: The next case is William G. Elliot vs. Thomas M. Robinson, and Thomas W. Elliot vs. Thomas M. Robinson; the two cases I understand are to be considered together.

Mr. Burnett: Correct.

The Court: And are you ready to proceed? You have some testimony to take?

Mr. Burnett: We are ready to proceed. We would like to make an opening statement.

The Court: Very well, make a short statement on both sides for the record.

Mr. Burnett: These two cases have been consolidated for trial; they involve one basic issue and that is the plaintiffs received certain payments under an agreement which was called a lease agreement and purchase option.

The basic facts, jurisdictional facts have all been stipulated to, and we have stipulated that in the event of a holding for the plaintiffs that the parties will compute any overpayment and submit that to the court. The court won't have to be bothered with computing the tax [3] in other words.

I would like to just briefly describe this agreement and of course we will cover it better in our testimony and in our brief, and we will cover the case law that determines this kind of case.

But we would like to point out the courts are uniformly in agreement that the substance of an agreement will control for federal tax purposes rather than the form that it takes, and in particular the Ninth Circuit in two tax cases has held that agreements entitled leases, somewhat similar to the one in this case, were actually conditional sales agreements and would be treated as such for federal tax purposes rather than as leases.

Now as to some background. The plaintiffs in these cases purchased a business building in Kalispell, Montana, known as the Buffalo Block in 1922.

They were engaged in the retail business. They were operating in this building commercial companies and office space. Now over a period of years their gross rental was approximately \$17,000 a year. They paid cash expenses out of that sum in the approximate amount of \$9,000 a year, and they incurred depreciation in the approximate rate of \$2,000 a year, leaving net income of about \$6,000 a year.

The principal tenant in this building [4] for a great number of years was the Flathead Commercial Company, which was engaged in the general selling of dry goods and mercantile business.

Now in 1945 the F. A. Buttrey Company desired to purchase the stock of the Flathead Commercial Company. They didn't want to buy the stock of the corporation; they wanted to buy its assets and after some negotiations a sale was consummated as of January 31, 1946.

Now Mr. Thomas Elliot, one of the plaintiffs in

this case was the principal stockholder of the Flat-head Commercial Company, and his reason for selling was generally he wanted to get out of this type business in Kalispell.

As a part of buying this stock the F. A. Buttrey Company wanted the same space they occupied and after some negotiations this agreement, which was dated January 14, 1946, under this agreement Buttreys agreed to pay to the Elliots \$19,000 a year for ten years. At the end of the 10 years they had what was called an option to purchase the property for \$75,000. This agreement was drawn by the attorneys for Buttreys.

The Buttreys agreed to pay all the taxes, to keep the building insured in at least the amount of \$175,000, and to pay all expenses, repairs and wages; the Elliots paid nothing after this agreement was signed. [5]

They in fact took no interest in the building; they didn't take any interest you would expect a landlord to take; they treat it as if the building was sold to Buttreys.

The agreement further provided that the plaintiffs would place a warranty deed in escrow with the Conrad National Bank, and the agreement provided that the bank was to deliver the deed to Buttreys upon the receipt of the \$75,000 option if they exercised it, and the agreement provided they contemplated exercising the option.

Now in speaking of reporting net income of \$6,000 a year after the agreement was executed, they received \$19,000 and that was all net; they

didn't have to pay any expenses, so the context of those figures goes part way at least of showing that these payments called rentals weren't tenant rentals, they were installment payments on the conditional sales contract.

Now in closing I would like to say at a first look or first blush look on this agreement it uses the words lease or rental and perhaps on a careful look that is what it would appear to be, but we feel after complete analysis is made of the agreement, plus the additional facts which surround the case, will conclusively prove or conclusively show that this agreement for federal income tax purposes is to be treated as a conditional sales contract. Thank you.

Mr. Rees: May it please the court. The two suits before the court today involve claims for recovery of money paid as federal income taxes but they are unique in this respect, that at least I do not consider that there is really any tax question involved for the reason in a situation of this kind, as the court will appreciate, the Government is only a stakeholder and I will explain that by suggesting to your Honor, and I am sure Mr. Burnett will agree, that in factual situations of this kind, if we assume that there was a lease entered into between the parties, between the parties, not necessarily the parties in this case, then the lessor in receiving rents represent the money as ordinary income and it is taxed as ordinary income; conversely, the lessee who makes the payments claims deductions on his tax return which normally would be allowed in the regular course of business, and to that extent the

Government collects the taxes justly due as a result of the exchange of money between the parties.

Now on the other hand if we presume that the transaction was a sale, then, of course, the recipient, the vendor and recipient of the payments treats those as payments which may be taxed either as ordinary income or as capital gains.

The parties have stipulated in this case certain facts which so far as these two cases are [7] concerned would occasion capital gain treatment.

Then the purchaser of course would simplify the record payments that he makes on the transaction as expenditures of capital, and the tax problem is one of general application, and the matter of working out the problems of the respective parties is essentially simple. There is no real tax controversy that can arise between the parties.

Now the parties here have been able through their counsel to agree upon a multitude of detail facts which are necessary as a background to a decision by your Honor in the case. I think we have saved substantial time in that regard and we are satisfied among ourselves that the facts, that the statements we make are facts.

We are fortunate in that the Court of Appeals of the Ninth Circuit quite recently, I believe on October 29, 1955, has rendered a decision with which your Honor is familiar in a case involving somewhat similar facts and the same question, so we believe the law is pretty definitely settled now in the Ninth Circuit; but at any rate your Honor has something to guide him in the decision of the

case. I believe that ends any statement that I should make at this time. Thank you.

Mr. Burnett: Your Honor, before we introduce our first witness we have some agreements we have entered [8] into and I thought I would enter those at this time.

The Court: Very well.

Mr. Burnett: Let the record show these cases have been consolidated for trial and the written agreement to that effect has been filed with the Clerk.

Let the record show the attorneys for the parties have stipulated as to certain documentary evidence and they are now filed with the Clerk.

Let the record show in case No. 1727 the plaintiffs have amended their complaint consisting of two paragraphs and the defendant's counsel has agreed that we can amend our complaint; they deny the allegation in paragraph one and admit the allegation in paragraph two.

Mr. Galles: That is correct, your Honor.

Mr. Burnett: And that has been filed.

Let the record show in case No. 1728 the plaintiffs have amended the complaint; it consists of five paragraphs, on which the attorneys for the defendant have no objection to amending the complaint; they deny the allegations in paragraphs one and two and they admit the allegations in paragraphs three, four and five.

Mr. Galles: We acknowledge that to be a correct statement.

Mr. Burnett: Let the record show in case No.

1728 the parties have filed an agreed stipulation of facts and [9] that has been filed with the Clerk.

Mr. Burnett: Let the record show that an exhibit numbered Plaintiff's Exhibit No. 1 for cases 1727 and 1728 has been stipulated as evidence in this case by both parties.

Mr. Galles: We agree to it, however, we would like the opportunity to have this document withdrawn and photostated so the parties may have copies of it.

The Court: Very well, that may be done.

Mr. Burnett: Let the record show Mr. Jerome Anderson is appearing as one of the attorneys for the plaintiffs in both cases.

The Court: Very well.

Mr. Burnett: One further point, your Honor; we are stipulating a similar stipulation of facts in the other case and our secretary is typing that now and she will bring that over sometime during the trial and we will probably enter it.

Mr. Anderson: I would like to say, this, your Honor, at this time the purpose of introducing Plaintiff's Exhibit 1 is so that your Honor understands the use of the exhibit is for the purpose of showing the income received from rentals of the Buffalo Block, which is the property involved in the agreement that is under contest today, during the period 1936 through 1945. I think in [10] other respects the exhibit is self-explanatory; it lists the rents received, total expenses, also depreciation taken and reflects the net income realized by the parties from the use of the building.

Mr. Anderson: Call Mr. Thomas W. Elliott, please.

THOMAS W. ELLIOTT

plaintiff, was called as a witness, and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Tom, can you hear me all right? A. Yes.

Q. Would you state your name, please?

A. Thomas William Elliott.

Q. What is your residence, Mr. Elliott?

A. Kalispell, Montana.

Q. And are you the same Thomas W. Elliott who is one of the plaintiffs in cause 1728 that is being tried here this morning? A. I am.

Q. And who is Evelyn W. Elliott?

A. My wife.

Q. And she also is plaintiff in this action with you, is she, is that correct? A. She is. [11]

Q. How long have you resided in Kalispell, Mr. Elliott? A. Since 1912.

Q. And what is your present age? A. 81.

Q. What is your present occupation?

A. With others operating a furniture store in Billings, Montana named Elliott Brothers, Inc.

Q. And you are an officer of the corporation?

A. I am.

Q. What position do you hold?

A. President and Director.

Q. Did you at any time in the past conduct any business operations in Kalispell, Montana?

A. I did.

(Testimony of Thomas W. Elliott.)

Q. And prior to the year 1946 did you manage and operate a business known as the Flathead Commercial Company? A. I did.

Q. Was that a corporation? A. It was.

Q. And were you an officer of that corporation?

A. Yes, I was.

Q. Actually were you the person that managed and ran the business? A. I was.

Q. How long had that company been in business in Kalispell? [12] A. Many years.

Q. Could you remember when it first went into business, what year? A. It was in the 20s.

Q. About 23 approximately?

A. Something like that.

Q. And in what building in Kalispell was this particular store business located?

A. In the Buffalo Block.

Q. What type business was conducted by the Flathead Commercial Company?

A. Department store.

Q. General merchandise? A. Yes.

Q. And retail sale or is that right?

A. Retail, yes.

Q. Now what portion of the Buffalo Block did the Flathead Commercial Company occupy in the year 1945 and early part of the year 1946?

A. The basement and first floor, that applied to 75 foot frontage.

Q. How many front feet actually?

A. 125.

Q. The Buffalo Block had 125 front footage?

(Testimony of Thomas W. Elliott.)

A. On Main Street, yes, sir. [13]

Q. Would you describe generally for the court the type of building and the type of construction of the building known as the Buffalo Block?

A. Store fronts, brick walls and usual internal divisions supporting the walls.

Q. How many stores did the Buffalo Block have?

A. Two and the basement, first and second floor and basement.

Q. Who actually owned the Buffalo Block, Mr. Elliott?

A. My brother and I.

Q. And when did you purchase that building?

A. In 23 I believe.

Q. Was that the same time you commenced the business known as Flathead Commercial Company?

A. The Flathead Commercial Company was in existence before that time.

Q. Now with respect to the space occupied by the Flathead Commercial Company you have testified they occupied 75 front feet on the first floor of the building, what other tenants occupied the other portions of the building?

A. Several stores.

Q. In 1945 was that Safeway Stores?

A. Yes.

Q. Were there any other stores on the first floor of that building in 1945? [14]

A. No.

Q. And what use did you make of the second floor of the building?

A. Offices.

Q. Was the entire second floor rented in the year 1945?

(Testimony of Thomas W. Elliott.)

A. As much as could be, no tenants were refused; there were some vacancies.

Q. How long had Safeway Stores been in the first floor of the building?

A. A number of years. They purchased McMarr.

Q. Did they hold the space in the first floor of the building under lease from you? A. Yes.

Q. When did that lease expire, do you recall?

A. No, I do not.

Q. Would it have been approximately in the year 1947?

A. Well it could have; I just can't answer that positively.

Q. Now in the year 1945 were you approached by any parties who were interested in purchasing the business and the store of the Flathead Commercial Company? A. I was.

Q. And who approached you for that purpose?

A. Representative of Buttrey's, Havre.

Q. Is that the chain store known as Buttreys that [15] operates here in Montana?

A. It was. It is.

Q. And is that the company which eventually executed together with you a certain agreement which is a part of the complaint on file herein and has been entered as evidence by stipulation which is marked K as part of the complaint?

A. Yes, that is the company.

Q. Now when Buttreys first approached you in the latter part of 1945 did you have any intention

(Testimony of Thomas W. Elliott.)

at that time of selling the Flathead Commercial Company? A. I did not.

Mr. Galles: To which we will object, your Honor, as a conclusion of this witness and no proper foundation has been laid.

The Court: Yes, there was subsequently a written agreement entered into between the parties which would ordinarily preclude any verbal discussion beforehand.

Mr. Anderson: Your Honor, initially the purpose of the contract, if I may just make a brief statement here, is to show the circumstances prior to the signing and execution of the agreement which I referred to as Exhibit I. The exhibit I does not refer to the sale of the Flathead Commercial Company itself but I think the information with regard to the sale of that company at a time concurrent [16] to the execution of the agreement marked Exhibit K which is the subject of the proceeding here today for reference for the court's purpose in determining the facts and circumstances surrounding the execution of that agreement.

The Court: Well you may make a brief record of it and the court will consider it, of course, subject to the objection under the general rule applicable in such cases; this might be an exception to the rule because I don't know what you might be able to bring out, what sort of record you might be able to make.

Mr. Anderson: I might just state rather briefly that a Ninth Circuit case in 1955 in Wallburga

(Testimony of Thomas W. Elliott.)

Oesterreich vs. Collector of Internal Revenue, 55-2 United States Tax case book 9733, has declared that in a case of somewhat similar facts to this case involving interpretation of an agreement which initially used the term leasing and so forth on the same question presented here today has stated that in this particular instance the courts commonly consider the conduct of the parties and the legal effect of the instrument, but they stated what the parties believed the legal effect to be on the transaction should be the criterion under which the court should admit evidence and reach its decision. Now in that regard I take it the plaintiffs should be able to show all the facts and circumstances surrounding and so that the court will have [17] the benefit of the information available to it to understand what the parties thought they were doing at the time the transaction was made.

Mr. Galles: Your Honor, in response to that argument in order for counsel to proceed on a theory he must show the contract which finally resulted is ambiguous and need for this explanation in order to interpret the contract. We contend the contract is perfectly clear and speaks for itself, and parol evidence surrounding entering into a contract and its interpretation is not admissible, and I think the same case Mr. Anderson cites says the intention of the parties is not admissible if the contract is clear and unambiguous.

The Court: Well you take the position some ambiguity exists in addition to the necessity of de-

(Testimony of Thomas W. Elliott.)

termining the intent of the parties before they entered into the contract?

Mr. Anderson: Your Honor, I don't quite agree with the theory Mr. Galles has cited here. Generally it is lack of understanding of the law in tax cases before the federal court and before the tax court that this question of, well the admission of parol evidence to show intent of the parties and so forth surrounding the actual execution of the contract and the effect of the instrument itself it is of no importance in this type of tax litigation; that in reality the Government is a third party and was not [18] a party to the written instrument which is submitted here for your consideration here today, and as far as the intention is concerned of the parties, the people who made the instrument have the right to come before the court and show the facts and circumstances surrounding it.

The Court: I will let you make your record and we will determine what to do with it later on.

Mr. Galles: If I may add one thing. I think when counsel says the Government was not a party to the contract I think that is additional support for the position we take in the case.

The Court: Very well, you may make your record as briefly as you can and we will consider it later on and see whether your theory applies.

Mr. Galles: We may have a continuing objection to the circumstances, your Honor.

The Court: Certainly; it is all subject to your objection.

(Testimony of Thomas W. Elliott.)

Mr. Anderson: Read the question and answer.

(Question and answer read.)

Q. (By Mr. Anderson): Actually do you recall when Buttrey's first talked to you about purchasing the Flathead Commercial Company?

A. Well immediately I might say for a few years previous. [19]

Q. But specifically in 1945 when they endeavored to enter into serious negotiations with you do you recall when that was, approximately what part of the year?

A. I would say in vacation time, about July or August.

Q. And then did those negotiations continue with respect to the sale of the Flathead Commercial Company?

A. They later continued, yes.

Q. When, Mr. Elliott, did you first determine that perhaps you desired to sell your store business?

A. Late in 1945 my health wasn't of the best and a long ways from it and I got to thinking that probably the end was near and if it did happen that things would be in bad shape, and my partner had been saying that I should relieve myself of this burden, and one day I came to the conclusion that he was right, I called him up and told him to go ahead, I would make the deal.

Q. Who do you refer to as your partner, is that William G. Elliott? A. Yes.

Q. And he is your brother, is that correct?

(Testimony of Thomas W. Elliott.)

A. Yes, and also Howard Elliott who is my present partner and is the son of W. G. Elliott.

Q. Now when you finally determined that you desired to sell the store business did you then actively continue negotiations with Buttreys at some place other than Kalispell, [20] Montana?

A. I did.

Q. And where was that?

A. Billings, Montana.

Q. And what month of the year 1945 was that?

A. In November.

Q. Did you go to Billings in 1945 in December to discuss this with Buttreys? A. Yes.

Q. And did you continue to negotiate at Billings, Montana, in December, 1945? A. Yes.

Q. And who was present when those negotiations were conducted here in Billings?

A. Here in Billings?

Q. Yes.

A. Well I can't name them correctly. Cliff Banks.

Q. And who was with Mr. Banks?

A. Banks represented the Buttreys.

Q. Was your brother, Mr. William Elliott, present? A. He was.

Q. Was your nephew, Howard Elliott, present?

A. Yes.

Q. Were there other representatives of the Buttreys Stores present? If you don't recall, say so.

[No answer in copy.]

Q. Now at the time you discussed with Buttreys

(Testimony of Thomas W. Elliott.)

the sale of the Flathead Commercial Company did the Buttrees Store corporation make any offer to purchase the Buffalo Block from you and Mr. William G. Elliott?

A. No, not at that time.

Q. Did you assure them however at that time that they would have space available in the block to conduct the business?

A. I did what we did.

Q. What was the arrangement to be as it was specified in 1945 with respect to not remaining in the building?

A. Renting it.

Q. And were they to occupy the same space you occupied at the time?

A. Yes, they were.

Q. And did they state to your rental price they would be willing to pay you for the floor space occupied by the Flathead Commercial Company?

A. They did.

Q. Do you recall what that price was?

A. I do not.

Mr. Galles: We will object to that as being hearsay.

The Court: He was negotiating so far as the others are concerned; I will let him state under objection, and [22] all of this is subject to objection.

Q. (By Mr. Anderson): Do you recall specifically what that purchase price was—strike that—do you recall specifically what the amount was they would pay you for leasing that space in the first floor of the building?

(Testimony of Thomas W. Elliott.)

A. I don't just remember.

Q. Do you recall how the offer was conveyed to you? A. By letter.

Q. And if I were to show you the letter which you received from Buttreys containing the offer, would that refresh your memory so that you could recall that price?

A. It certainly would.

Q. I hand you a letter dated December 8, 1945, on a letterhead of F. A. Buttreys, signed by Cliff Banks, and ask you if that refreshes your memory of the amount of money Buttreys was to pay you to lease the space occupied by the Flathead Commercial Company? A. It does.

Q. And what amount was that, sir?

A. 15 year lease at \$775 per month, for the space now occupied by the Flathead Commercial Company in Kalispell with option to lease the space now occupied by the Safeway Stores at the expiration of their lease in 1947 or sooner should they vacate at \$425 a month. [23]

Q. Now finally in December 1945 did you or Buttreys or you and your brother arrive at an agreement and final agreement for the purchase or sale of the goods and business of the Flathead Commercial Company to Buttreys Stores?

A. We did.

Q. And did you assure them at that time that they would be able to lease the space in the building now occupied to conduct the business?

A. We did.

(Testimony of Thomas W. Elliott.)

Q. And did you assure them at that time—And then did you return to Kalispell, Montana?

A. Surely.

Q. Now subsequent to the first day of January, 1946, and in that month were you and your brother again approached with respect to the disposition of the building which was known as the Buffalo Block?

A. It was suggested they might be interested in purchasing it.

Q. And who suggested that, Buttreys?

A. Some representative of Buttreys.

Q. And where was that suggestion made?

A. In Kalispell.

Q. Now at that time did you yourself in the commencement of the negotiations with respect to the sale of the building have any intention of selling your interest in the building? [24]

A. We did not.

Q. Did you then later change your mind with respect to the intention to see the building?

A. Yes, I did.

Q. And when was your attitude changed toward this?

A. During negotiations that month and their making what I thought was a very favorable offer I decided that provided my partner was willing that we would sell it.

Q. During that period of time did they make specific offers of purchase price amounts to you for the building itself? A. They must have.

(Testimony of Thomas W. Elliott.)

Q. Then after you finally decided that you desired to sell the building what occurred? Did you then enter into negotiations in connection with an agreement to be executed relative to the sale?

A. We did.

Q. Did you yourself conduct those negotiations, the major portion of them with respect to that agreement? A. My partner and I did.

Q. Where did you first see this particular agreement, Mr. Elliott, which is marked Exhibit I in the complaint in this action and Exhibit K in the complaint in your brother's action? Where did you first see that agreement? A. In Kalispell.

Q. Where in Kalispell? [25]

A. In the law offices of Walchi and Korn.

Q. Were they lawyers in Kalispell?

A. They are, were, yes, sir.

Q. And who requested you to go to the offices of Walchi and Korn?

A. Well my brother who had been conducting the negotiations came and said and presented them to me and I read it and he asked me to come over and we meet there in the offices of Walchi and Korn.

Q. Were there any representatives of Buttreys in the office of Walchi and Korn at that time?

A. Yes, there was.

Q. And was your brother Mr. William G. Elliott there at that time? A. He was.

Q. Did you read the agreement in the office at that time? A. I did.

(Testimony of Thomas W. Elliott.)

Q. And at that time did you make any suggestions or request any changes in the form of the agreement that merely resulted in changes in the form? A. Not that I recall.

Q. Did you sign the agreement that day in Walchi and Korn's office? A. I did.

Q. Now when you went to that office, Mr. Elliott, what [26] was your intention with respect to the disposition of this property? A. To sell it.

Q. To whom? A. To Buttreys.

Q. Had you employed Kalchi and Korn as attorneys to represent you in connection with this sale?

A. We had not.

Q. Did you at any time pay them any legal fee?

A. We did not.

Q. With respect to representing you in this sale? A. We did not.

Q. After you examined this instrument Exhibit I in your complaint did you consult with any other attorney with respect to the legal effect of that instrument? A. I did not.

Q. Did you consult with any tax consultant or accountant with respect to the tax consequences of that instrument? A. I did not.

Q. Were you at that time trained and have any particular knowledge of taxes?

A. None whatever.

Q. Well now it seems rather strange that you wouldn't have taken this instrument to another attorney for examination; could you explain to the court why you did not? [27]

(Testimony of Thomas W. Elliott.)

A. Well I was probably too simple.

Q. Well was there any other particular reason to trust the attorneys representing Buttreys?

A. I did.

Q. Had you known them before?

A. Yes, they were our attorneys in other matters and had been for years.

Q. So that when they presented the instrument to you you didn't concern yourself with the legal effect of it, is that correct? A. No, I did not.

Q. Now the agreement was executed by you at that time and specifies that an abstract of title brought up to the agreement and warranty deed to the property described in the agreement be placed in escrow in the Conrad National Bank in Conrad, Montana, did you place the agreement in escrow in that bank? A. We did.

Q. And the deed and the abstract were placed in escrow, is that right? A. That is right.

Q. And did that escrow remain in existence until the termination of the agreement which you signed? A. It did.

The Court: Conrad, Montana? [28]

Mr. Anderson: Conrad National Bank in Kalispell.

The Court: You said Conrad, Montana?

Mr. Anderson: I am sorry.

Q. (By Mr. Anderson): Now subsequent to the execution of this agreement, Mr. Elliott, did you following this agreement move out of the Buffalo Block? A. I did.

(Testimony of Thomas W. Elliott.)

Q. And subsequent to the execution of the agreement did you pay any expenses in connection with the operation of that building? A. No.

Q. As a matter of fact have you made any payments for taxes levied against the building or the real property upon which it sets subsequent to the first day of September, 1946? A. No.

Q. Have you made any payments for repairs in connection with the construction of the building?

A. No.

Q. Have you collected any rentals from the tenants of the building? A. No.

Q. In other words, Mr. Elliott, did you completely terminate your relation with the management and control of [29] or control of the building?

A. Not at all except to see the insurance was kept up.

Q. Now I noticed that the contract marked Exhibit I provides that insurance in the amount of at least \$175,000 be maintained by Buttreys during the term of the agreement, could you tell us how or why the figure of \$175,000 was arrived at?

A. Well I suppose the insurable value.

Q. In other words, in your mind——

A. In other words, there was a difference in the policies at that time where as I remember it that you had to carry a part of the risk yourself. I forget what they call that kind of a policy.

Q. So that in your mind the insurable value of the building was in an amount of at least of \$175,000, is that correct?

(Testimony of Thomas W. Elliott.)

A. Yes, at the time; that is the minimum.

Q. Now after the agreement was entered into and for the year 1946 a partnership return was filed on behalf of the partnership which existed between you and your brother with respect to the income received from the Buffalo Block, is that correct?

A. What was that again.

Q. Mr. Elliott, for the year 1946 a partnership return was prepared and filed for you and your brother with respect [30] to the income received by you from rentals during the earlier part of the year and payments on this agreement from the Buffalo Block, is that correct?

A. Previous to 1946.

Q. No, for the year 1946? Well, let me ask you this. Did you have prepared a partnership income tax return?

A. Yes, annually.

Q. That was prepared and filed, was it not?

A. Yes.

Q. And who prepared that partnership return for you?

A. Gregory B. Duffy.

Q. Now you and Mr. Gregory—did you say?

A. Gregory Duffy was a bookkeeper and valued friend.

Q. Did he live in Kalispell?

A. He did and does.

Q. And what was his occupation at the time he prepared this partnership return for you?

A. Bookkeeping.

Q. Who did he work for?

(Testimony of Thomas W. Elliott.)

A. Kalispell Flour Mills, in existence at that time.

Q. Had he prepared partnership returns for you and your brother in previous years?

A. Yes, every year.

Q. And will you explain to the court the manner in which you gave the information to Mr. Duffy from which he got the [31] figures relative to income and expenses presented to him?

A. I took the rental receipts and records which I kept over to him with the expense cash payment book and all papers in connection with it to his office at the Kalispell Flour Mills and left them with him and he made out the report.

Q. Did he request any particular explanation on any of the entries in the books from you at that time? A. Did he what?

Q. Did he ask you for any particular explanation of any of the entries in the books at that time?

A. Not that I recall.

Q. In other words, you just left the book with him and let him go ahead?

A. Sure, yes, I left them in his hands, at his pleasure.

Q. Now these partnership returns which were signed by you and your brother on income of the Buffalo Block were both state and federal income tax returns, were they not? A. Yes.

Q. Now I have noticed in examining your partnership returns that Mr. Duffy specified therein that the income for the year 1946 received by you

(Testimony of Thomas W. Elliott.)

from the Buffalo Block was referred to therein as rental income, did you instruct him to refer to that as rental income? [32] A. I did not.

Q. When you signed the partnership return did you happen to notice that he had so designated the income? A. I did.

Q. Now after the agreement had been entered into which is referred to here as Exhibit I, Mr. Elliott, and at some later date were you informed that that particular agreement had the effect perhaps of not reflecting a sale of the property?

A. Unofficially, yes.

Q. And where did you first get any information or have anybody give you the idea that perhaps maybe you had signed something you had not intended to sign?

A. At a gathering at a luncheon group in the tea room in the Elks Building in Kalispell, Montana.

Q. And what was the nature of the information that was given to you?

A. Well that it had been slipped over on us and that we were vulnerable.

Q. And how long after the agreement was signed was that?

A. I couldn't say positively; it was a matter of a few weeks, maybe a month or two.

Q. So that later then what was your attitude toward the legal effect of the instrument, did you then realize [33] that perhaps the terminology in

(Testimony of Thomas W. Elliott.)

the instrument referred to something other than a sale?

A. I did and concluded the best thing I could do was keep my mouth shut.

Q. Were you advised thereafter by any person that perhaps your tax returns which had been filed showing income received by virtue of this agreement as rental were incorrectly filed and that you were entitled to a refund? A. Yes.

Q. Who told you that? Did an accountant explain the situation to you? Who told you that the income tax returns possibly had been incorrectly filed? A. I can't answer.

Q. Well to refresh your memory somewhat did your nephew discuss this matter with you some time later, Mr. Howard Elliott? A. Yes, he did.

Q. And how long after this agreement was entered into did Howard Elliott advise and first refer this matter to you? A. Very quickly.

Q. And then I assume you took the necessary steps to file your refund claim is that correct?

A. Yes, to have me file them.

Q. Now, Mr. Elliott, at approximately the same time that the negotiations were completed in the latter part of [34] January and first day of February, 1946, with respect to the sale of the Buffalo Block did you prepare a memorandum for your business files reflecting thereon your understanding as to the business arrangements that had been entered into with Buttreys on this building?

(Testimony of Thomas W. Elliott.)

A. I did for my own on my partnership information.

Q. And did you then place that memorandum in your files? A. I did.

Q. And is that memorandum in existence today?

A. It is.

Mr. Anderson: Mr. Clerk, would you mark this exhibit "Sale of Buffalo Block" as Plaintiff's Exhibit 2?

Q. Now, Mr. Elliott, I hand you a paper entitled at the top "Sale of Buffalo Block, February 1st, 1946" and marked for identification as Plaintiff's Exhibit 2 and ask you if this was the memorandum which you have prepared for your business records?

A. It is.

Q. And is it in the same form today as it was at the time it was prepared? A. Exactly.

Q. Are there any changes on the face of the document other than the mark of the Clerk stating Plaintiff's Exhibit 2? A. Nothing.

Q. And was that prepared for you personally?

A. It was.

Q. And on what date?

A. February 1st, 1946.

Mr. Anderson: At this time, your Honor, I would like to introduce this document in evidence.

Mr. Galles: We will object to the proposed exhibit as being immaterial and irrelevant in this action, your Honor.

The Court: It may go in on the record subject to the objection.

(Testimony of Thomas W. Elliott.)

Q. (By Mr. Anderson): Now referring you, Mr. Elliott, to Plaintiff's Exhibit 2, would you please explain for the record the meaning of the figures reflected thereon so that the court will understand on examining the exhibit what you intended when you wrote the memorandum?

A. Well the object of my making this out was to know what we sold the Buffalo Block for. With that idea in mind I took the matter of the \$190,000 that would be paid in ten year period at 3 per cent and figured the interest because we would get that, and that at 3 per cent would be \$5,700, but it only would have the total amount one-half of the period, five years, so one-half is—that is wrong—\$57,000—one-half is \$28,500, and then \$75,000 is the final payment, and I figured it at 3 per cent which we would not get until [36] the final payment; that figured up to \$22,500. Taking the sum of \$28,500 and the sum of \$22,500 and adding them together and deducting that amount from the total of the deal, total amount of the deal, \$265,000, left me for the building \$214,000, figured at 3 per cent.

Q. In other words, would you explain what the figure \$265,000 was in your mind?

A. That was the gross amount.

Q. Was that the purchase price?

A. That was the purchase price, yes.

Q. And you were endeavoring to determine by your memorandum in reality what the principal amount was you were receiving from the building

(Testimony of Thomas W. Elliott.)

and figuring interest of 3 per cent at the time of the sale, is that correct?

A. That is right, and I also figured it a couple other rates.

Q. You also figured it at other interest rates, did you? A. Yes.

Q. Now referring again to the agreement which is marked Exhibit K and attached to your complaint and Exhibit K attached to your brother's complaint, did you sign the original agreement of which those exhibits are a copy?

A. What was that question again?

Q. Did you sign the original of the exhibit marked Exhibit I and attached to the complaint of which Exhibit I is [37] a copy? A. Yes.

Q. That agreement provides for payments of \$19,000 a year for a period of 10 years with the first payment to be made concurrently with the execution of the contract, did you and your brother receive all of those payments? A. We did.

Q. The agreement further provides for a final payment of \$75,000, did you and your brother receive that payment? A. We did.

Q. And when was the final payment received by you and your brother?

A. November 5th, 1955.

Q. And was any notice sent to you by Buttreys Stores that they were going to make this payment prior to your receiving it? A. None.

Q. And was the deed and the abstract and so

(Testimony of Thomas W. Elliott.)

forth given to Buttneys when the final payment was made by the bank?

A. They sent their check to the Conrad National Bank and they handled it for us and credited it to my account the portion of it to come to me.

Q. Now during the period of time that the agreement was in existence to your knowledge was the amount of insurance carried on the building by F. A. Buttrey Company [38] increased in an amount greater than the \$175,000 figure called for in the contract? A. Materially, yes.

Q. Do you recall to what amount it was increased? A. \$250,000.

Q. Was that at your request? A. No, sir.

Q. How did you receive notice the insurance was increased? A. They sent notice to me.

Q. Now, of course, Mr. Elliott, after filing your refund claims for all of the years specified in the complaint you received notice of the disallowance of those claims or most of them from the United States Government, isn't that correct?

A. That is correct.

Q. With respect to the notice of disallowance for the year 1948 do you recall receiving any such notice from the United States Government?

A. 1948?

Q. Yes. A. I do not recall it, no.

Q. You have no notice in your files at the present time to your knowledge, do you?

A. Not that I am aware of; possibly I am vulnerable on those things. When I received letters

(Testimony of Thomas W. Elliott.)

from the Department [39] of Internal Revenue that this or that matter was disallowed or anything of that kind I took it as being correct and signed it and had my wife sign it and returned it.

Q. Did you consult with any accountant or attorney before you signed those instruments?

A. I did not.

Q. In other words, you just signed them believing in the integrity of the United States Government, is that right?

A. That is correct, the Department of Internal Revenue at Helena.

The Court: We will take a recess. (11:35 A.M.)

Court resumed, pursuant to recess, at 11:45 A.M. at which time all parties and counsel were present.

THOMAS W. ELLIOTT

resumed the stand and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Anderson): I will just ask you a few more questions, Tom, and you can go back to Kalispell and go fishing. We referred earlier this morning to the increase in the amounts of insurance carried on the building during the term of this transaction by Buttreys, you stating that the insurance was eventually increased to the amount of \$250,000. Now do you recall when the first increase was made in the amount of [40] insurance on the building by Buttreys?

A. I couldn't answer as to the definite year but

(Testimony of Thomas W. Elliott.)

it was in the few years after the sale was made, the first increase.

Q. Was that first increase sufficient in amount to bring it to the figure \$250,000?

A. No, it was not. I forget the figure but it wasn't that amount.

Q. Then was it again increased later?

A. It was.

Q. And when did the insurance finally reach the amount of \$250,000?

A. Well in the last two or three years.

Q. Now at the time this agreement was executed was there any doubt in your mind that Buttreys intended to make all of the payments referred to in the agreement including the final \$75,000 payment?

A. Never a doubt.

Q. Now of course at the time that you entered into this transaction with Buttreys, Mr. Elliott, you must have had some idea in your mind as to the value, the market value of this property in January of 1946, didn't you?

A. Oh, yes, I thought I did.

Q. You had an opinion then as to the amount that property was worth, is that correct? [41]

A. Yes.

Q. And what in your opinion at that time was the approximate value of that property, the fair reasonable market value of it in January of 1946?

A. In January of 1946?

Q. Yes, sir.

(Testimony of Thomas W. Elliott.)

A. Well, my opinion was around \$200,000 more or less.

Q. In any event it was worth to you at that time and you figured it could be sold for more than \$75,000, is that correct?

A. It certainly was, yes.

Mr. Anderson: I believe that is all.

Mr. Galles: We have no questions, your Honor.

The Court: Call your next witness.

HOWARD ELLIOTT

was called as a witness and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Anderson): Please state your name, sir? A. Howard William Elliott.

Q. Where do you reside, Mr. Elliott?

A. 1767 Poly Drive, Billings.

Q. What is your age? [42] A. 45.

Q. What is your present occupation?

A. I am manager of Elliot's Furniture.

Q. Is that business located in Billings, Montana? A. It is.

Q. Is that incorporated? A. It is.

Q. And is Mr. Thomas Elliott who previously preceded you on the witness stand an officer of that corporation? A. He is the President.

Q. What capacity do you hold?

A. I am the Vice President and Manager.

Q. Are you related to Mr. Thomas Elliott?

(Testimony of Howard Elliott.)

A. He is my uncle.

Q. And are you related to William G. Elliott?

A. He is my father.

Q. And in years past have you resided in the city of Kalispell?

A. Yes, I was there from the age of 10 through to 28.

Q. And you left there and subsequently wound up living in Billings, is that correct?

A. That is correct.

Q. Now you have heard the testimony of Thomas Elliott this morning, your uncle, and he referred to certain negotiations with the sale of the Flathead Commercial [43] company that were conducted in the latter part of the year 1945, were you acquainted with the negotiations?

A. Yes, sir.

Q. Did you participate in those negotiations?

A. I did.

Q. When did you first become involved in negotiations for the sale of that store and business?

A. Possibly in 43 or 44 when I was trying to urge my uncle to sell.

Q. Why were you endeavoring to urge him to sell?

A. In my opinion his health was such he would be better off out of business then.

Q. And what was the condition of your father's health at that time? A. Not good.

Q. Was he actively engaging in the business of

(Testimony of Howard Elliott.)

the Flathead Commercial Company or the management of the Buffalo Block at that time?

A. No.

Q. Now were you personally approached by Buttneys with respect to the sale of this business?

A. Only in so far as to obtain my influence to get my uncle to agree to sell.

Q. And when they approached you with respect to the sale of the business did they mention anything in connection [44] with the building known as the Buffalo Block? A. They did not.

Q. Now in connection with the negotiations that were conducted in December, 1945, were you present during those negotiations? A. I did not.

Q. And did you advise your uncle to sell that particular part of the business? A. I did.

Q. At that time was any reference made by Buttneys to the continuance of the use of the space occupied by the Flathead Commercial Company on the first floor of the Buffalo Block?

A. Not specifically.

Q. Was any reference made then possibly leasing that particular property or that particular space in that building?

A. At that meeting that was fairly well understood due to our previous offer they did ask my uncle if he had changed his mind about selling and he said no.

Q. Now what was your advice at that time to your uncle and your father with respect to the disposition of the Buffalo Block?

(Testimony of Howard Elliott.)

Mr. Galles: We object to this, your Honor, on the same grounds as previously stated.

The Court: It may be received subject to the objection. [45]

A. My advice was to sell.

Q. And were you present in Kalispell, Montana thereafter at the time that the negotiations were conducted with reference to the sale of this building? A. I was not.

Q. Did you know anything about the fact that they had been contacted by Buttneys on that agreement such as Exhibit K was about to be entered into between them? A. I did not.

Q. When was the first time that you received knowledge of the fact your uncle and his brother had entered into the agreement marked Exhibit K in the complaint of your uncle's in this action?

A. I can't recall exactly but I would say within a few weeks subsequent to the filing, signing of the agreement.

Q. And did either your uncle or your father indicate to you after the execution of that agreement their opinion as to the legal effect of that agreement? A. They did not.

Q. Did they ever indicate to you later whether they at that time had intended the agreement to effect a sale or rental of the property?

A. Will you repeat that? They both know they had sold the property.

Q. Did they so inform you? [46]

(Testimony of Howard Elliott.)

A. Yes.

Q. Now Thomas Elliott has testified previous to you in this action that he received certain advice from you relative to the possibility of his obtaining refunds from the United States Government on tax returns filed by him for the years commencing 1946 and on through the year 1953, did you so advise him? A. I did.

Q. Would you tell us briefly how this situation arose?

A. In earlier years my father resided in Missoula and Gregory Duffy had been handling all his income tax returns. He moved from Missoula to Billings I believe in 1946 or early 47 or late 46, and for one or two years Mr. Duffy continued as an accountant. On my advice, I suggested that he transfer that job from Kalispell to Billings for a matter of convenience and Mr. Frank Hoile was employed to file those returns. Mr. Hoile advised me that in his opinion my father was entitled to a refund on income tax for the years 46, 7 and 8 and 9 up until the time he filed the return for the current year which I believe was 50.

Q. So on that basis you advised your father and subsequently your uncle to take some action in this matter, is that correct? A. That is correct.

Q. Did either of them realize at the time that you advised, so advised them that any advantage had been taken over them by Buttreys Stores with respect to the tax consequences of this agreement?

Mr. Galles: To which we object as being a con-

(Testimony of Howard Elliott.)

clusion of this witness and without proper foundation.

Mr. Anderson: We will rephrase the question.

Q. Did either your uncle or your brother at the time that you first informed them that they might have some refunds coming from the Government on their tax return, did either of them indicate to you or inform you that they had any knowledge that Buttneys Stores had taken advantage of them tax-wise in connection with the agreement which had been executed?

A. Yes, I had previously advised them to that effect.

Q. But prior to your giving them any advice or at the time you first gave it to them did they indicate to you they knew they had been taken advantage of? A. No, they did not.

Q. Now at the time the negotiations were conducted at Billings did Buttneys indicate then specifically whether or not they desired to purchase the property or were interested in purchasing the Buffalo Block?

A. Only insofar as they asked them if they had changed their mind about not deciding to sell. [48]

Mr. Anderson: That is all.

Mr. Galles: No questions.

S. GEDDES

was called as a witness by plaintiffs and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Anderson): Would you state your name, please? A. S. Geddes.

Q. Where do you reside?

A. Kalispell, Montana.

Q. How long have you lived in Kalispell?

A. Since 35.

Q. What is your present age? A. 59.

Q. What is your occupation?

A. Insurance agent.

Q. And what type insurance do you sell, Mr. Geddes.

A. Fire and casualty and allied lines.

Q. Does this include insurance policies by companies who represent, who insure buildings, commercial properties, etc.? A. That is right.

Q. How long have you been in the general insurance [49] business?

A. Since 41, I believe, 40, somewheres along there.

Q. And during that period of time and prior thereto were you engaged in any other form of business? A. Real estate business.

Q. And would you state how long you have been engaged in the real estate business?

A. Approximately ten years.

Q. And are you still actively engaged in that business? A. No.

(Testimony of S. Geddes.)

Q. How long ago did you terminate the business? A. Two years.

Q. Was all of your experience in the real estate business gained in the city of Kalispell, Montana? A. That is correct.

Q. And would you just state briefly the nature of the real estate business referred to in which you engaged?

A. Well we sold buildings, took listings to sell dwellings, properties of various nature, appraisals on real estate or courtesy appraisals, and where we suggest a selling price.

Q. In other words, during the course of your business of being a real estate agent you also engaged then I take it from time to time in appraisals of properties for the purposes mentioned by you, is that correct? [50] A. That is correct.

Q. During that same period of time then were you also engaged in the sale of risk insurance on properties? A. Yes, sir.

Q. Now during your experience as a real estate man in Kalispell, Montana, have you appraised or valued commercial real estate properties in the business district of Kalispell, Montana?

A. I have.

Q. And was that for the same purpose you previously mentioned in your testimony?

A. Yes, sir.

Q. Have your appraisals been accepted?

A. They have.

Q. Have they even been questioned?

(Testimony of S. Geddes.)

A. Not to my knowledge.

Q. Were you in the year 53 requested to appraise the real property only upon which a business known as the Buffalo Block was located?

A. Yes, sir.

Q. And who requested you to make this appraisal?

A. Howard Elliott, Billings, Montana.

Q. Were you acquainted with Mr. Howard Elliott previous to the time he came in and asked you to make this appraisal? A. I was not.

Q. Did he inform you at the time he requested the appraisal the purpose for which the appraisal was being made?

Mr. Galles: We will object to this line of questioning, your Honor, because it is immaterial and irrelevant and on the same grounds stated it has nothing to do with the issue in the case as we see it.

The Court: Well, it would seem so but we will let him make his record; your objection will be considered later.

(Question read.)

A. He did not.

Q. Did he ask you to make the appraisal as of 53 or as of some previous year?

A. As of the previous year.

Q. What year was that? A. 46.

Q. Did you so make that appraisal?

A. I did.

Q. Do you have an opinion as to the value of

(Testimony of S. Geddes.)

the real estate upon which is situated a building known as the Buffalo Block, Kalispell, Montana, as of the year 56—or 46—I am sorry?

A. I am.

Q. And in your opinion, Mr. Geddes, what was the fair reasonable market value of this real property in the year 46? [52]

A. 935 a running front foot.

Q. And how many running front feet are contained in the lots upon which the Buffalo Block is situated? A. 125.

Q. So therefore, Mr. Geddes, what would be the total valuation of that real property as of the year 46? A. \$116,875, I believe.

Q. Is that a specific figure now you are certain of or would you care to compute it?

A. Well it could be computed. Well I could compute it.

Q. Would you please do so?

A. It seems to multiple out.

Q. Then what is the figure you arrived at as a result of your computation? A. 116,875.

Q. Dollars? A. Dollars.

Q. Now does that figure include the building situated upon the real property?

A. No, it does not.

Q. Now this agreement which has been referred to previously this morning, Mr. Geddes, in the testimony of Mr. Elliott, provided that the building located upon this property should be insured in an amount at least as great as the sum of

(Testimony of S. Geddes.)

\$175,000, in your opinion was that amount [53] excessive, approximately correct; would that amount reflect in other words the value of the commercial building located upon that property at that time? A. It would not.

Q. And what do you mean when you say it would not?

A. I was requested to appraise the real property without building or improvements.

Q. Perhaps you misunderstood my question. I am asking you whether you made appraisal in 46. I am asking you whether the amount of insurance required to be carried on the building by the contract, that amount being \$175,000, was greater than the value of the building in your opinion in the year 46?

A. It was not.

Q. Now subsequent to the execution of this agreement, Mr. Geddes, have you carried or has your company retained some of the insurance that has been carried on the building known as the Buffalo Block?

A. We were contributing agents.

Q. And were those policies at least in the amount from the time after the year 46 through the year 55 increased?

A. They were increased twice but I would not, I do not recall the dates.

Q. Well now when you say increased in price?

A. Increased twice. [54]

(Testimony of S. Geddes.)

Q. I am sorry. I misunderstood you. Who requested the increases be made in the insurance?

A. F. A. Buttrey Company, Havre.

Q. Was any request made of you by either of the two Elliotts involved in these two cases?

A. No.

Mr. Anderson: That is all.

Mr. Galles: No cross examination.

The Court: Do you have some further testimony?

Mr. Anderson: Your Honor, the other plaintiff, Mr. William G. Elliott, in the companion case is present in the courtroom; he however fell in April of this year and was injured and I really do not feel is in physical condition to testify here today. We will not call him particularly because of his physical condition and the fact he suffered a blow on the head as a result of a fall and has certain lapses of memory; he is 78 years old and has not fully recovered from the injury he has received and he is here today and I would like the record to show that.

The Court: Very well.

The Court: Have you some testimony?

Mr. Galles: No, your Honor.

Mr. Burnett: I would just like to emphasize issue, that we have agreed between the parties that we will then compute what any overpayments would be and submit that to the court at that time. again, your Honor, we have stipulated that if the court [55] finds for the plaintiffs on this basic

Mr. Anderson: The plaintiff rests, your Honor, in both causes.

Mr. Galles: We have no evidence to offer, your Honor. We rely on the statement and our theory of the case as stated and we feel the only question is the construction of the instrument itself, which is clear and unambiguous.

Mr. Burnett: Your Honor, we would like to request two months for our first brief and one month for any reply.

The Court: Well I suppose you need the record, do you?

Mr. Burnett: Yes, we need the two months from the time we get the transcript; we need the transcript.

The Court: Is that agreeable on the other side?

Mr. Galles: We don't need that much, your Honor, but we have no objection.

Mr. Anderson: Your Honor, I might say at this time there might be some question in the record as to our position with respect to the instrument itself; I don't want the court to have the idea that we don't have the feeling that the instrument is ambiguous; in other words, we feel that the [56] instrument is susceptible to interpretation that the fact the instrument does not reflect the true intent of the instrument and that the language does not reflect the true intent and legal effect of the instrument in that really it is ambiguous and I want to make that clear for the record.

Mr. Burnett: Your Honor, we now have the stipulation in the William Elliott case which was

being typed this morning and we will go over that with counsel for the time and enter it with the Clerk after we agree.

The Court: Well under all the circumstances after receipt of the transcript you may take 60 days for your briefs and you may have 30 days or as much less time as you need; if you want to take 60 days, I will treat you the same as the other side.

Mr. Galles: 30 days is satisfactory, your Honor.

The Court: And then you may have 20 days to reply. That seems to conclude our business then in this case. (12:15 P.M. June 15, 1956.) [57]

[Endorsed]: Filed July 30, 1956.

[Endorsed]: Nos. 15983 and 15984. United States Court of Appeals for the Ninth Circuit. Thomas M. Robinson, Appellant, vs. William G. Elliott, Appellee. Thomas M. Robinson, Appellant, vs. Thomas W. Elliot and Evelyn W. Elliot, Appellees. Transcript of Record. Appeals from the United States District Court for the District of Montana.

Filed: March 28, 1958.

Docketed: April 10, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.